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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1155~~ 84

UNITED STATES OF AMERICA,

Appellant,

—versus—

MILAN VUITCH, M.D.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellee, pursuant to Rule 16, moves that the final judgment and decree of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

Citation to Opinions Below

The decision below of the United States District Court for the District of Columbia, Gesell, *J.*, is reported as *United States* v. *Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *appeal docketed*, 38 U.S.L.W. 3303 (U.S. Feb. 5, 1970) (No. 1155, October 1969 Term).

Jurisdiction

Appellant's Statement adequately states the jurisdictional basis for this appeal, *i.e.*, 18 U.S.C. §3731.

Statute Involved

D.C. Code §22-201, at 19 (1967 ed.) provides:

> "Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years. . . ."

Questions Presented

I. Whether D.C. Code §22-201, which forbids a physician to interrupt pregnancy unless "necessary for the preservation of the mother's life or health" is unconstitutionally vague and indefinite, where the statute provides no warning to the physician, jury, or judge of what physical, mental, or social conditions may be taken into account when assessing necessity.

II. Whether D.C. Code §22-201 deprives physicians and their patients of rights protected by the First, Fourth, Fifth, and Ninth Amendments, and is neither narrowly drawn nor supported by any overriding and compelling governmental interest.

Statement of the Case

Appellee Milan Vuitch, M.D., a licensed and practicing physician in the District of Columbia, was charged by indictment with violation of D.C. CODE §22-201, a statute of 1901 vintage. Appellee moved at pretrial to dismiss the indictment, contending that the statute was unconstitutional on various grounds. Upon the receipt of extensive briefs and oral argument, the district court, Gesell, *J.*, granted this motion.[1] The court held the statute to be unconstitutionally vague and indefinite. 305 F. Supp. at 1034. Moreover, the court recognized that certain Fifth Amendment questions existed because the physician was "presumed guilty," 305 F. Supp. at 1034, and that "the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals." *Id.*

It is from this decision, invalidating the statute on its face and as applied against physicians as a class, that the government has taken this direct appeal.[2]

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[1] A companion case, *United States* v. *Boyd*, 305 F. Supp. 1032, 1035-36 (D.D.C. 1969) (not appealed), grew out of a completely unrelated incident involving a nurse's aide, and has no bearing upon this appeal although Appellants have discussed that "unrelated" case in their Statement, pp. 2-3.

[2] The Jurisdictional Statement does not challenge the lower court's holding that the statute is severable and may be validly applied to prohibit all abortions done by non-physicians. 305 F. Supp. at 1035; see, e.g., *United States* v. *Jackson*, 390 U.S. 570, 585-91 (1968). Thus, the question of severability is not at issue in this appeal.

The Questions Are Not Substantial

The decision below is so manifestly correct as not to warrant further argument before it is affirmed by this Court.

Introduction

The constitutionality of abortion laws has been much in the minds of judges and commentators even before the landmark decision of *California* v. *Belous*,[3] and the present case.

Professor Emerson at Yale suggested in December of 1965 that the *Griswold* case would open the way "for an attack upon significant aspects of the abortion laws."[4] Retired Justice Tom C. Clark, writing in 1969, fully agreed.[5] Recognizing that "[if] the medical profession is to be accorded complete protection, it will have to come through the judicial system,"[6] Justice Clark suggested that, constitutionally, "until the time that life is present, the State cannot interfere with the interruption of pregnancy through an abortion performed in a hospital or under appropriate clinical conditions."[7] Other commentators have taken a like view.[8]

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[3] 71 Cal.2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. —— (1970).

[4] Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L. Rev. 219, 232 (1965).

[5] Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 Loyola Univ. (L.A.) L. Rev. 1 (1969) [hereinafter Clark].

[6] Clark, p. 7.

[7] *Id.* at 8.

[8] Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. Rev.

Several courts have already faced constitutional questions similar to those presented in this action. The first, a lower court in California, ruled on September 24, 1968, that the pre-1967 felony abortion statute in that state violated the Eighth and Fourteenth Amendment rights of certain patients. Their physicians had been charged with unprofessional conduct.[9] They had performed hospital-approved therapeutic abortions on patients who had been exposed to the German measles virus.

One year later the Supreme Court of California rendered its decision in *California* v. *Belous*.[10] A close reading of Judge Peter's opinion reveals four separate grounds for the decision: (1) facial unconstitutional uncertainty;[11] (2) unconstitutional abridgement of the woman's right to choose whether to bear children,[12] if (a) the statute were construed to require "certainty of death,"[13] or (b) if the statute were construed to "prohibit an abortion, where death from childbirth although not medically certain, would be substantially certain or more likely than not";[14] (3) unconstitutional uncertainty if the statute were construed to mean "'substantially or reasonably' necessary to pre-

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730 (1968); Note, *Constitutional Aspects of Present Criminal Abortion Law*, 3 Valpr. U.L. Rev. 102 (1968).

[9] *Shiveley* v. *Board of Medical Examiners*, No. 590333 (Cal. Super. Ct., San Fran. Cty., Sept. 24, 1968) (not reported), *on remand from* 65 Cal.2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968) (granting physicians' motions for discovery).

[10] 71 Cal.2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

[11] 71 Cal.2d at 1003, 458 P.2d at 197, 80 Cal. Rptr. at 357.

[12] 71 Cal.2d at 1005, 458 P.2d at 199, 80 Cal. Rptr. at 359.

[13] 71 Cal.2d at 1005, 458 P.2d at 199, 80 Cal. Rptr. at 359.

[14] 71 Cal.2d at 1012, 458 P.2d at 203, 80 Cal. Rptr. at 363.

serve"[15] the woman's life; and (4) a Fourteenth Amendment violation because of "[t]he delegation of decision-making power to a directly involved individual . . . ."[16]

Declaratory judgment actions involving state abortion statutes are pending before three-judge federal courts in several states.[17]

This epidemic of judicial activity in the abortion area recognizes that the medical profession is unable to work with the vagueness and potential sweep of the statutes which regulate abortion, and no other surgery, in the 50 states and the District of Columbia. The statute in the District, moreover, is unique. Its wording, which appears in

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[15] 71 Cal.2d at 1012, 458 P.2d at 204, 80 Cal. Rptr. at 364.

[16] 71 Cal.2d at 1015, 458 P.2d at 206, 80 Cal. Rptr. at 366.

[17] See, e.g., *Hall* v. *Lefkowitz*, 305 F. Supp. 1030, 69 Civ. 4284 (S.D.N.Y., filed Sept. 30, 1969) (before Friendly, *J.*, and Weinfeld & Tyler, *D.J.J.*); *Babbitz* v. *McCann*, 306 F. Supp. 400, 69-C-548 (E.D. Wis.) (before Kerner, *J.*, and Reynolds & Gordon, *D.J.J.*).

California v. *Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct. Orange Cty. Jan. 9, 1970), has recently invalidated the current California abortion statute in a criminal prosecution of a physician. The decision rests upon numerous grounds, including the right of a woman to decide whether to bear children, and the presence of economic discrimination in violation of the equal protection clause of the Fourteenth Amendment.

In June of 1969, the Supreme Judicial Court of Massachusetts sustained its abortion statute over a challenge of vagueness. *Kudish* v. *Board of Registration*, —— Mass. ——, 248 N.E.2d 264 (1969) (not appealed).

Similarly, *Moretti* v. *New Jersey*, 52 N.J. 182, 244 A.2d 499, *cert. denied*, 393 U.S. 952 (1968), upheld the abortion law of that state over a vagueness challenge. The New Jersey law, however, prohibits abortions performed "maliciously or without lawful justification," N.J. STAT. §2A:87-1, and the abortion in that case was to have been performed by an inspector for the State Board of Barber Examiners.

only one other state abortion law,[18] is vague and restrictive of the physicians' and patients' rights who must attempt to operate within its uncertain peripheries.

I.

D.C. Code §22-201, which forbids a physician to interrupt pregnancy unless "necessary for the preservation of the mother's life or health" is unconstitutionally vague and indefinite, because it provides no warning to the physician, jury, or judge of what physical, mental, or social conditions may be taken into account when assessing necessity.

The Legal Standard

A vast body of case law exists on the problem of unconstitutional uncertainty.[19] This doctrine has, moreover, several complementary, and several competing strands. The test most frequently articulated has been that

> "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

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[18] ALA. CODE tit. 14, §9 (1958). *See generally* George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. Res. L. Rev. 371 (1966); Lucas, *Abortion Laws in the United States*, in ABORTION: LEGAL, MEDICAL, SOCIAL, and RELIGIOUS ASPECTS (R. Lucas ed. 1970) (in press).

[19] *See generally* Amsterdam, *The Void for Vagueness Doctrine*, 109 U. Pa. L. Rev. 67 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 Corn. L.Q. 195 (1955); Aigler, *Legislation in Vague or General Terms*, 21 Mich. L. Rev. 831 (1923); Freund, *The Use of Indefinite Terms in Statutes*, 30 Yale L.J. 437 (1921); Note, 62 Harv. L. Rev. 77 (1948).

> differ as to its application, violates the first essential of due process . . . ."[20]

This is partly because

> "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."[21]

Clearly, "[v]ague laws in any area suffer a constitutional infirmity,"[22] be they of common law antiquity,[23] administrative,[24] or criminal.[25] Furthermore, statutes challenged for vagueness which impinge upon sensitive human rights are to be closely scrutinized. *Griswold* v. *Connecticut* dealt with "a right of privacy older than the Bill of Rights . . ."[26] and that right is invoked again here, as well as the right to give medical advice, which is more nearly a facet of pure freedom of speech. Thus, "[p]recision of regulation must

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[20] *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

[21] *United States* v. *Reese*, 92 U.S. 214, 221 (1875).

[22] *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966) (ancient common law offense of "criminal libel" void for uncertainty).

[23] *Lanzetta* v. *New Jersey*, 306 U.S. 451, 454-55 (1939); *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 242-43 (1932). See also *United States* v. *Evans*, 333 U.S. 483 (1948), in which the statute had been passed in 1917; and *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), in which the statute had been passed in 1860.

[24] See, e.g., *Keyishian* v. *Regents*, 385 U.S. 589 (1967).

[25] *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939).

[26] 381 U.S. 479, 486 (1965).

e in an area so closely touching our most
be the touchston[ns."][27]
precious freedon[s never ruled on a vagueness challenge to
This Court ha[s, but the invalidity of the language follows
a similar statute[s of the difficulties a physician must face
from an analysi[s
in applying it.

Statute in Practice

Vagueness of the and legal commentary have recognized the
Both medical [American abortion laws. Retired Justice
uncertainty of [remarked:
Clark recently r[sing number of abortions subjects physi-

"The increas[reased dangers of liability for incorrectly
cians to inc[; a statute . . . . [D]octors face an uncer-
interpreting[hen performing an abortion. This uncer-
tain fate w[continue unless the legislatures or courts
tainty will [ief from liability."][28]
provide rel[

Christopher [Tietze, perhaps internationally the most
knowledgeable [authority on abortion practices and statis-
tics, commented

"The applica[tion of these laws, however, varies greatly
between loc[alities and between hospitals."][29]

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[27] *NAACP* v. *B[utton,* 371 U.S. 415, 438 (1963).

[28] Clark, p. 7.

[29] Tietze, *Mater[nal Mortality Associated With Legal Abortion,* Proceedings of th[e Fifth International Conference on Planned Parenthood 24 (Oct. 1955) (Tokyo); *see also* M. CALDERONE, ABORTION IN THE UNITED STATES 34-35, 52 (1958):

"[N]ecessity as a sine qua non of performing an abortion . . . leaves the doctor's position perilous and uncertain. * * * The current laws provide no accurate criteria by which the doctor can govern his actions."

Similarly, a 1967 study concluded:

> "Abortion policies vary not only from hospital to hospital but also from service to service within the same hospital. They also vary widely from doctor to doctor on the same service of the same hospital." [30]

And, as Dr. Alan F. Guttmacher indicated in an early study, "[t]he doctor's dilemma lies in the phrase 'preserving the life of the woman.'" [31] If "preserving life" is a difficult standard, then "preserving health" only accentuates the "doctor's dilemma."

Appellants have urged that "the statute may be applied without ambiguity, to doctors who do not exercise medical judgment at all . . ." (J.S., at 6). Yet such a formulation would increase the ambiguity of the statute, for a jury would be left to determine whether the physician had, indeed, exercised a "medical judgment." Many physicians consider a woman's personal desire not to be compelled to have further children as sufficient justification for abortion. A study conducted by the journal Modern Medicine in fact showed that 51% of American physicians, and 61.4% of physicians in the District of Columbia agreed without qualification that abortion should be available to any woman capable of giving legal consent upon her own

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[30] Hall, *Abortion in American Hospitals*, 57 Am. J. Pub. Health 1933, 1935 (1967). Dr. Hall continues:

> "The victim of all this confusion is, of course, the American female . . . . [S]he must find Doctor X in hospital Y with policy Z in order to have it done." *Id.*

[31] Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 J. Mt. Sinai Hosp. 111 (1954). *See also* Niswander, *Medical Abortion Practices in the United States*, 17 W. Res. L. Rev. 403, 411-419 (1965).

request to a competent physician.[32] The sphere of medical judgment, in such a case, then narrows to the medical question of whether reasons exist for *not* performing the requested abortion, a circumstance which is exceedingly rare (and unregulable by the blunderbuss of a criminal statute) in this day when abortion in early pregnancy is seven times *safer* than its alternative—childbirth.[33]

In no sphere of medicine other than abortion does a criminal statute impose such a burden upon a physician, and in no other sphere of medical practice is treatment restricted by criminal law to those instances in which it is "necessary for the preservation of the mother's life or health." The Court might consider the impact on the lives of all citizens if a penal statute prohibited gall bladder surgery, kidney stone removal, the prescription of contraceptives,[34] use of antibiotics, vaccination,[35] or even the taking of aspirin "unless necessary for the preservation of the life or health" of the patient. There are and never have been such laws or practices, outside of the quite different realm of drug regulation. It is from this area that Appellant has drawn *Linder* v. *United States*, 268 U.S. 5

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[32] *Modern Medicine*, Nov. 3, 1969, at 18-24. An additional 11.8% nationally and 11.2% in the District agreed to the proposition, but with some qualification.

[33] See Tietze, *Mortality With Contraception and Induced Abortion*, 45 Studies in Family Planning 6 (1969), and other authorities cited in note 67, *infra*.

[34] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), at least implies that such a requirement would violate the patient's right of privacy, but Connecticut, for obvious reasons, made no such contention.

[35] *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1904), has even held that a State may compel vaccination over the stringent religious objections of an unwilling patient.

(1925), and *Boyd* v. *United States*, 271 U.S. 104 (1926), on which great reliance is placed (J.S., at 7).

Linder and *Boyd* involved the question of a physician's dispensing "hard" narcotics (i.e., morphine and cocaine). The statute required that this be done "in the course of his [the physician's] professional practice only."[36] This Court found in *Linder* that "[w]hat constitutes *bona fide* medical practice must be determined upon consideration of evidence and attending circumstances." 268 U.S. at 18. This was not a decision, as Appellant states, that "the statute was subject to an absolute defense of good faith belief by the physician that the drugs were appropriate for treatment of the addict" (J.S., at 7).

In several respects *Linder* and *Boyd* are inapposite and inapplicable. Trafficking in hard narcotics is socially reprehensible conduct, for which statutory standards of specificity need not be so stringent. Abortion, like contraception, however, involves sensitive individual rights, see *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965), and most frequently the "intimate relation of husband and wife and their physician's role in one aspect of that relation." Privacy in family planning is today a value which government promotes. Moreover, the problem of hard narcotics is susceptible to much sharper analysis than that of abortion. One can separate out the physician who helps an addict withdraw from one who feeds a habit for profit. With abortion, however, there is no such line, and the statute has not drawn an intelligible point of demarcation. Many physicians believe that a woman's unwillingness to be forced through pregnancy is a sufficient health problem

[36] Harrison Narcotic Law, 38 Stat. 785, *as amended*, 40 Stat. 1130.

to justify abortion. The statute, taken with a defense of good faith, is no guarantee of acquittal before a jury of laymen with a different view. What is evident in the Government's attack on the District Court's decision is that it insists upon the doctor's bearing of the burden of proof of innocence, *i.e.*, that he in fact used medical judgment. Moreover, a jury must agree with what he conceived to be medical justification for the treatment involved before acquitting him. Such is the very essence of the constitutional fault in this statute and other statutes like it. On any analysis of this vague requirement, altogether lacking acceptable standards, there will never be an instance in which a physician is able to defend his actions successfully where the evidence shows an exercise of medical judgment which the Government seeks to challenge.

Additionally, the requirement of consultation (which question the Government here contends should be submitted to a jury) before performing the operation, or as the Government puts it, the requisite exercise of medical judgment, causes the burden to shift to the defendant to prove that his action was necessary to preserve the mother's life or health and leaves the defendant on the horns of a desperate dilemma. If he fails to come forward (as is his constitutional right), the jury will be left without proof upon which even to speculate as to whether or not medical judgment was exercised. If he does come forward and the jury is left to speculate on his medical judgment, he could well be convicted of providing acceptable medical treatment ~~with~~ which a lay jury could totally disregard for any number of speculative reasons. In effect, therefore, the doctor-defendant would seriously risk conviction no matter whether he chose to come forward or remain

silent. Aside from the unsatisfying prospect that a jury should pass on medical judgment (which is the sole function of the physician after diagnosis and consultation) the theory which the Government would ask the Court to approve here would convict the defendant whether or not he takes the stand if the jury should believe that the medical judgment he exercised was, in its opinion, inadequate. A statute having such an effect is fatally defective, as found by the District Court, and as underscored by this Court's decisions in *Tot* v. *United States,* 319 U.S. 463 (1943); *United States* v. *Gainey,* 380 U.S. 63 (1965); *United States* v. *Romano,* 382 U.S. 136 (1965); and *Leary* v. *United States,* 395 U.S. 6 (1967). As the District Court points out, this Court has long since left behind the ancient theory that legislators may compel presumptions, the effect of which are to deny an accused his constitutional rights.

It is the patient's entire life-setting which is ideally taken into account today, not simply whether a disease will lead to his or her death or disability. It is largely because of this civilized progress in medicine that the statute has become increasingly vague through the years. Life has become more than survival. It has been seen to contain a spectrum of conditions, matters of degree which contribute to the quality of existence, rather than the bare fact of survival. Health has come to embrace the entire sphere of physical and mental well-being.

Ultimately the question is one of law for this Court to resolve. Based on the available evidence, and this Court's reading of the statute, a decision must be reached on whether Appellee, other physicians, and their patients will be consigned to living under the regime of this statute.

The expression challenged for vagueness is:

"necessary for the preservation of the mother's life or health...." D.C. Code §22-201.

(a) Vagueness of "life"

The very term "life" is susceptible to widely differing interpretations. Does it mean immediate survival? probable survival for a period of days? weeks? months? years? Is "life" equivalent to longevity? Does a patient's "life" encompass her physical and mental "health"? the "quality of life"? her overall well-being? her desire and life plan to be no longer burdened with additional children? These are common concerns in medicine, but the statute does not speak to these very realistic human problems, and no set of jury instructions, however well phrased by a trial judge, could lead a jury through the maze of these issues to a fortified conclusion as to a physician's guilt or innocence.

Also, who is to decide what constitutes the concept of a woman's "life"? she? her husband? the physician? a jury of twelve laymen? one or more judges? Ultimately this question will go to a jury on conflicting evidence, without statutory guidance, subject to an uncertain degree of judicial review. Should a physician and his patient be required to take this very great risk on no more guidance than the statute provides?

(b) Vagueness of "health"

As Judge Gesell noted below:

"The word 'health' is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health." 305 F. Supp. at 1034.

A 1943 decision delivered by then Associate Justice Arnold of the Court of Appeals for this Circuit found that this provision of the statute "is a broad exception without precise limits." *Williams* v. *United States*, 78 U.S. App. D.C. 147, 150, 138 F.2d 81, 84 (1943). Compare *Musser* v. *Utah*, 333 U.S. 95, 97 (1948) ("acts injurious to public morals" may include "almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health [etc.] . . . .").

Indeed, preservation of "health" could mean relief from any burden upon the woman and her family. On the other hand, a more rigid construction could mean only relief from a pregnancy which would make the woman an absolute broken physical wreck at the end of pregnancy. The statute, and a "good faith" defense, however, do not provide the physician with any knowledge of which meaning a court and jury will adopt; yet his personal liberty and the right to practice his profession depend entirely upon the jury's acceptance or rejection of that defense.

(c) Vagueness of "preservation" [37]

On its face, and even more seriously when taken in connection with the other terms, "preservation" or "preserve" can bear many meanings. Does it mean to keep alive and, if so, for how long? Or does it mean to keep free from harm or injury? serious injury? how serious?

Is "preserve" synonymous with "save," and, if so, does not "save" have too wide a range of meanings to be used in

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[37] *California* v. *Belous*, 71 Cal.2d 996, 1003, 458 P.2d 194, 198, 80 Cal. Rptr. 354, 358 (1969), found the term "preserve" too vague for use in a criminal abortion statute.

a statute affecting such important interests as those of the physician and patient? Or, is "preserve" a much broader notion, meaning maintain, protect, safeguard, enrich? The statute and the cases are silent. Again, the question goes to the lay jury, without guidelines.

(d) Vagueness of "necessary" [33]

The first three difficult terms are joined by a fourth "necessary." How necessary? Why necessary? Necessary to what end? The lawyer's standard dictionary states that the word "necessary"

> "must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought." BLACK'S LAW DICTIONARY 1181 (4th ed. 1967).

The statute gives no indication as to which of the possible meanings of "necessary" applies, nor the factors which may permissibly be taken into account. The judge and jury are permitted to consider any factors they choose. A statute which permitted only "necessary" noise was recently struck down by a district court in Pennsylvania.[34] This Court in *Yu Cong Eng* v. *Trinidad*[35] has described the term "necessary" as one of "great indefiniteness," 271 U.S. at 517,

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[33] *California* v. *Belous*, 71 Cal.2d 996, 1003, 458 P.2d 194, 198, 80 Cal. Rptr. 354, 358 (1969), found this term to be too indefinite as well.

[34] *Phillips* v. *Borough of Folcroft*, 305 F. Supp. 766 (E.D. Pa. 1969) (J. S. Lord, III, *J.*).

[35] 271 U.S. 500 (1926) (Taft, *C.J.*).

"a vague requirement and one objectionable in a criminal statute." 271 U.S. at 518. It is indeed.

* * * * *

In sum, the terminology of the statute provides almost no guidance to the conscientious physician who seeks to consider the overall circumstances and well-being of a woman faced with an unwanted pregnancy. The uncertainty of the words in isolation is multiplied by their usage together in the statute. This vagueness is further compounded by the fact that physicians in the District of Columbia have the burden of proving necessity and good faith if they should be charged with unjustifiable abortion.[41] It is evidenced by the medical and legal commentary cited. Its effect has been to produce differing interpretations from physician to physician, and hospital to hospital, as well as inherent discrimination against the poor woman who cannot purchase the information and psychiatric help sufficient to obtain a favorable "interpretation."[42]

For the reasons stated, the statute is plainly unconstitutional for its failure to meet the specificity requirements of the due process clause of the Fifth Amendment.

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[41] See *Williams* v. *United States*, 78 U.S. App. D.C. 147, 138 F.2d 81 (1943).

[42] Appellee has also raised and intends to preserve the contention that the statute violates the equal protection concept embodied in the Fifth Amendment by its impact on excluded classes of patients, *i.e.*, the poor patient and the woman who cannot persuade a hospital that continued pregnancy endangers her "health." See, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). These points will be presented in greater depth by the brief on the merits, should this be necessary.

II.

D.C. Code §22-201 deprives physicians and their patients of rights protected by the First, Fourth, Fifth, and Ninth Amendments, and is neither narrowly drawn nor supported by any overriding and compelling governmental interest.

Not only does Appellee challenge the vagueness of the statute, but also its substantive validity under the First, Fifth, and other amendments to the United States Constitution. This Court may hold that the statute is not uncertain and that it bears one or another construction which will sustain it. However, it is most unlikely that the statute, as written and re-enacted, can be construed to permit an abortion, in clinical surroundings, of a woman in good health, who has had contraceptive failure, or did not for some reason utilize contraceptives. Such a woman is the individual whose request for an abortion, in the very early stages of pregnancy, is most frequent.

Even assuming that this Court enjoins the statute for vagueness, the further question of overbreadth should be reached and decided. This has been the practice of the Court in a wide variety of cases, particularly where freedom of association[43] was at issue, as it is here. "[It] would furnish a definitive ruling on a point of federal law for . . . future guidance . . . "[44] of the parties. A final "definitive ruling" on the federal questions raised hereinafter would avoid costs and delay, prevent continued litigation on the substantive issues, and conserve judicial time and resources.

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[43] See, e.g., *NAACP* v. *Button*, 371 U.S. 415 (1963).

[44] *LSCRRC* v. *Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (Friendly, *J.*).

A. The Rights to Give and Receive Medical Advice and Treatment

The present action has First Amendment implications, namely the right of the physician to provide medical information, followed by treatment, for his patients, and the right of the patient to receive same. The right of a competent licensed physician to give medical advice can be characterized as free expression alone,[45] or when viewed as an aspect of the physician-patient relationship, it becomes part of the freedom of association between physician and patient. The First Amendment has long been held to accord presumptive protection for the "freedom to associate and privacy in one's associations." *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). This has been the case with the mari-

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[45] Similarly, it is an aspect of the physician's general liberty under the Fifth Amendment to practice his chosen profession free from unconstitutional restraint. See *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963); *Slochower* v. *Board of Higher Educ.*, 350 U.S. 551 (1956); *Birnbaum* v. *Trussell*, 371 F.2d 672 (2d Cir. 1966); see also *United States* v. *Freund*, 290 Fed. 411 (D. Mont. 1923), invalidating a Prohibition act which restricted the amount of alcohol a physician could prescribe:

> "It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice."

With respect to the prescription of contraceptives, moreover, physicians received considerable protection in many early cases to the point that the various Comstock acts took the path of desuetude. See, e.g., *United States* v. *Nicholas*, 97 F.2d 510 (2d Cir. 1938) (L. Hand, J.); *United States* v. *One Package*, 86 F.2d 737 (2d Cir. 1936) (A. Hand, J.); *Youngs Rubber Corp.* v. *C. I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930) (Swan, J.).

tal relationship,[46] and that of attorney and client.[47] The relationship between physician and patient is no different; it promotes the fundamental purpose of maintaining the health and well-being of the American people.

The advice aspect of medical practice is but one part of Appellee's claim, for medical treatment involving interruption of the unwanted pregnancy may be what the patient ultimately requests, and the criminal statute proscribes.

> "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest . . . must appear. . . . " *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

The nature of this interest has been described by "a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." 391 U.S. at 376-77 (citations omitted).

Before discussing the possible State interests which have been offered to compel a woman to bear and raise children against her will, Appellee will examine various other rights of constitutional dimension which the challenged statutes curtail.

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[46] See *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965), describing the "marriage relationship" as

> "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

[47] See *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railway Trainmen* v. *Virginia*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar*, 389 U.S. 217 (1967).

B. The Right of Privacy

The antecedents and progeny of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), offer generalized support for applying a presumptive constitutional right of privacy to encompass the right of a woman to have an abortion, in the early stages of pregnancy, when contraception failed or was not used.

Griswold is not an isolated decision confined to its facts, but is one in a continuing line of cases involving various aspects of personal privacy and family autonomy.[48] Most recently this Court recognized a "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) (Marshall, J.). Indeed, the *Stanley* case is of special importance, for there a majority of the Court embraced with approval the very significant language from Mr. Justice Brandeis' dissent in *Olmstead* v. *United States*:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to

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[48] Commentary on the *Griswold* case has been extensive. Particularly noteworthy materials include: Kelly, *Clio and the Court: An Illicit Love Affair* [1965] SUP. CT. REV. 119; Gross, *The Concept of Privacy*, 42 N.Y.U. L. Rev. 34 (1967); Pilpel, *Birth Control and a New Birth of Freedom*, 27 Ohio St. L.J. 679 (1966); Franklin, *The Ninth Amendment*, 40 Tul. L. Rev. 487 (1966); Beaney, *The Griswold Case and the Expanding Right to Privacy*, 1966 Wis. L. Rev. 979; *Symposium—Comments on the Griswold Case*, 64 Mich. L. Rev. 197 (1965); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814 (1966); Note, *The Supreme Court—1964 Term*, 79 Harv. L. Rev. 56, 162-65 (1965).

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[40] Clark, p. 9.

A first and recent example, *Loving* v. *Commonwealth*, 388 U.S. 1, 12 (1967) (alternate ground of decision), specifically held that the due process clause of the Fourteenth Amendment protects "[t]he freedom to marry . . . as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving* stands for the proposition that "the right to marry" is protected by the due process clause although not specifically mentioned in the Bill of Rights. The decision must lend further support to arguments that other important interests associated with marriage and the family are protected from arbitrary government intrusion.

Associated with the right to marry is the right to raise children, if one chooses, without arbitrary governmental interference. A unanimous Court indeed has held that "the right to have offspring" is a constitutionally protected "human right" which cannot be taken away by a discriminatory statute requiring the sterilization of some persons convicted of crime, but not of others similarly situated. *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942). Again, the right to have offspring is not mentioned in the Bill of Rights. However, the *Skinner* Court, composed of Justices Douglas (author of the opinion), Black, Reed, Frankfurter, Murphy, Byrnes, Roberts, Jackson, and Chief Justice Harlan Fiske Stone (the latter two wrote concurring opinions) had no difficulty holding that this right was protected by the Constitution. Moreover, these members of the Court had all disassociated themselves from the economic substantive due process school of thought found in the much criticized and overruled opinion of *Lochner* v. *New York*, 198 U.S. 45 (1905).

Assuming, then, that the right to have offspring enjoys a constitutional presumption of protection, should not a right *not* to have offspring be of equal stature under the Constitution?

Further cases upholding rights associated with the family include *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), both of which were subsequently reaffirmed in *Griswold* v. *Connecticut*, 381 U.S. 479, 483 (1965). A unanimous Court in *Pierce* recognized a right to send one's children to private school. This right was derived from "the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. The *Pierce* Court, moreover, included Justices who rejected the economic due process formula of *Lochner*, namely Justices Brandeis, Holmes, and Stone. On the basis of *Pierce*, is it not reasonable to argue that parents also should have a right to determine how many children whose "upbringing and education" they will direct? Not dissimilar to *Pierce* was *Meyer*, a 7-2 decision invalidating a State statute which prohibited the teaching of German to pupils below the eighth grade. The *Meyer* Court found that the due process clause included "the right . . . to marry, establish a home and bring up children." 262 U.S. at 399. Again, the decision is not objectionable as a manifestation of economic due process because it was joined by Justice Brandeis, among others, who rejected the *Lochner* scheme. The dissents, moreover, by Justices Holmes and Sutherland, rested on the assumption that the State had a substantial interest in assuring that foreign-born students and students of alien parentage had considerable training in the English language before being exposed to other languages.

Taken together, the *Griswold, Stanley, Loving, Skinner, Pierce,* and *Meyer* decisions all illustrate that the Constitution protects certain privacy and family interests from government intrusion unless a compelling substantial justification exists for the legislation.[40] Appellee contends that the right of a patient to determine whether to have additional children, and if not then to terminate a pregnancy in its early stages, is such a right, fully entitled to protection in the setting of this case.

C. The Right to Choose Whether and When to Bear and Raise Children

In addition to the decisions upholding rights associated with personal and family privacy, an overlapping body of precedent extends significant constitutional protection to the citizen's sovereignty over his or her own body.

As early as 1891 this Court stated:

> "No right is held more sacred, [n]or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.'" *Union Pac. Ry.* v. *Botsford,* 141 U.S. 250, 251 (1891), quoted in *Terry* v. *Ohio,* 392 U.S. 1, 8-9 (1968).

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[40] See also *Poe* v. *Ullman,* 367 U.S. 497, 551-52 (1961) (Mr. Justice Harlan, dissenting):

> "[T]he integrity of [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

This right, like all rights, has limits, as illustrated by *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1904). There this Court upheld a compulsory vaccination law, but only to avoid "great dangers" and to protect "the safety of the general public." 197 U.S. at 29. The lengths to which the Court went, however, to justify a shot in the arm point up the degree to which personal autonomy is entitled to protection.

In marital and family matters relating to procreation, this Court has consistently recognized and sustained the individual's rights, and has done so on a constitutional plane. "The freedom to marry . . . ," *Loving* v. *Commonwealth*, 388 U.S. 1, 12 (1967); "the right to have offspring," *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942); and "the liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-35 (1925), are all protected constitutional rights, embedded in American law, as is the right, at least of a married woman, to use contraceptives.

These rights, however, do not complete the set. Without a right to respond, a woman is at the mercy of possible contraceptive failure, particularly if she is unable or unwilling to utilize the most effective contraceptives. When pregnancy begins, she is faced with a governmental mandate compelling her to serve as an incubator for months, and finally as an ostensibly willing mother for up to twenty or more years. Often she must forego a career or further education, and endure economic and social hardships. Under the present law she is given no other choice. Continued pregnancy is compulsory, unless she can persuade

the authorities that she is potentially suicidal, or that her "health" is otherwise endangered.

Without the right to obviate contraceptive failure, other rights of privacy or family rights would be largely diluted. For this reason this Court should take the same position as *California* v. *Belous*, and recognize the constitutional validity of the "fundamental right of the woman to choose whether to bear children . . . ." 71 Cal. 2d at 1005, 458 P.2d at 199, 80 Cal. Rptr. at 359.

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The Distinction Between Personal and Economic Rights Under the Due Process Clause and the Relevance of the Ninth Amendment as an Aid to Construction:

Appellee's position is by no means an assertion that courts ought "to roam at large in the broad expanses of policy and morals,"[51] nor that this Court should "sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."[52] Here, as in *Griswold*, the position is that there are certain sacred rights associated with individual privacy and the marital relation. These rights have already been held to include the rights to marry, have children, not have children (by use of contraceptives), and raise children. Appellee claims that these rights also include the right not to have children in the case where preg-

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[51] *Adamson* v. *California*, 332 U.S. 46, 90 (1947) (dissenting opinion of Mr. Justice Black). See also *Griswold* v. *Connecticut*, 381 U.S. 479, 507 (1965) (Black, *J.*, dissenting); *id.* at 527 (Stewart, *J.*, dissenting); *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963).

[52] *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952).

nancy can be terminated in its early stages by means of an induced or therapeutic abortion. This is by no means a novel claim in light of the lines of decision discussed above.

Two distinctions can be made which limit the scope of the principle asserted: first, that there are constitutional justifications for treating "personal" rights differently from purely "economic" rights in cases arising under the due process clause, and second, that there are even weightier considerations for treating "privacy" and "marital" rights with great solicitude in order to protect these most important areas from legislative experimentation. *Griswold* recognized these distinctions. Writing for the majority Mr. Justice Douglas reaffirmed the proposition that the Court does not

> "sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions." 381 U.S. at 482.

However, the Court recognized an important distinction where the challenged statute

> "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." 381 U.S. at 482.

That is precisely the type of situation presented by this case, and the kind of circumstance envisioned by the concurring opinion in *Griswold* by Mr. Justice Goldberg:

> "I quite agree with Mr. Justice Brandeis that . . . 'a . . . State may . . . serve as a laboratory; and try novel social and economic experiments . . .' I do not believe that this includes the power to experiment with the fundamental liberties of citizens . . . ." 381 U.S. at 496.

It is apparent, moreover, that Justices Holmes, Brandeis, Stone, Jackson, Frankfurter, and Reed also took this position. They consistently rejected an economic due process approach, but joined in due process opinions which protected fundamental "personal" liberties. These have already been discussed at length.

In addition, there are more recent expressions which indicate a different standard for testing "legislation [which] touches upon fundamental individual and personal rights essential to maintaining the independence, integrity, and private development of a citizen in a highly organized, yet democratic society."[53] The several "right to travel" cases recognized a right which is nowhere spelled out in the Constitution or Bill of Rights,[54] as do decisions which broadly protect freedom of "association" far beyond the mere articulation of ideas and into the sphere of organized action.[55]

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[53] Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L. Rev. 219, 224 (1965). Professor Emerson suggests that this "distinction is . . . a fundamental one," *id.*, and analyzes cases which can be explained on such a basis. E.g., *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

[54] E.g., *Aptheker, supra; Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *United States* v. *Laub*, 385 U.S. 475 (1967); *Zemel* v. *Rusk*, 381 U.S. 1 (1965); *Lynd* v. *Rusk*, 389 F.2d 940 (D.C. Cir. 1967); see *United States* v. *Guest*, 383 U.S. 745, 757-59 (1966) (Stewart, J.):

> "The Constitutional right to travel . . . occupies a position fundamental to the concept of our Federal Union. * * * [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be . . . necessary . . . . * * * All have agreed that the right exists."

[55] See, e.g., *United Mine Workers* v. *Illinois State Bar*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964); *NAACP* v. *Button*, 371 U.S. 415 (1963).

Principled justification, moreover, exists for making this distinction.[28] The Constitution grants plenary power to the legislative branch to regulate commerce and to levy taxes for the general welfare. It grants no such power to the courts for appraising economic legislation. On the other hand, the Constitution grants considerable power to the courts for the purpose of protecting certain basic human rights. And, the Constitution grants no such power to the legislative branch for the purpose of experimenting with basic human rights because these rights are to be protected rather than subjected to legislative regulation. It follows, therefore, in light of the due process clause and the Ninth Amendment (discussed below), that the judiciary is charged with the protection of those rights in the Bill of Rights and other non-economic fundamental rights which have not been enumerated, such as those associated with the relation and the family, particularly where *federal* governmental action is present, as here.

Significantly, the text of the Constitution does not prohibit the courts from protecting basic human rights which are not enumerated. The draftsmen of the Bill of Rights could certainly have used language to limit the courts to protecting only those rights which were specifically named. The very opposite was done, however, by the expansive language of "rights" "not enumerated," "privileges and immunities," and "due process of law." These

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[28] The personal-economic dichotomy is also suggested in *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring); Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193, 215-24 (1952); *cf.* Tussman & ten Broek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 371-73 (1949) (similar dichotomy suggested for equal protection setting).

latter terms, moreover, were written against the background of Chief Justice Marshall's statement in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), that:

> "We must never forget that it is a Constitution we are expounding . . . intended to endure for ages to come, and consequently to be adapted to the various crises in human affairs."

Similarly, Mr. Justice Brandeis wrote:

> "Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world . . . . The progress of science in furnishing the Government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the Government . . . will be enabled to expose to a jury the most intimate occurrences of the home . . . . Can it be that the Constitution affords no protection against such invasions of individual security?"

Olmstead v. *United States*, 277 U.S. 438, 472, 474 (1928) (dissenting opinion).

Finally, what was said by Mr. Justice Stewart in a post-*Griswold* decision may be aptly paraphrased to apply in the present context:

> "The Constitutional right [of marital privacy] . . . occupies a position fundamental to the concept of our Federal Union. * * * [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be . . . necessary . . . ."

United States v. *Guest*, 383 U.S. 745, 757-58 (1966). Can it be that a right of marital privacy, or personal privacy or

autonomy, occupies a lesser position than a right to travel from state to state?

One basic purpose of the first nine amendments could not have been to render the courts helpless in the face of government intrusion upon personal and marital privacy. What has been said concerning the due process clause and the distinction between personal and economic rights finds further support in the Ninth Amendment, as recognized in the *Griswold* concurrence by Mr. Justice Goldberg, Chief Justice Warren, and Justice Brennan.[57]

Justice Goldberg summarized his interpretation of the Ninth Amendment as follows:[58]

> "I do not mean to imply that the Ninth Amendment is applied against the State by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the State or the Federal Govern-

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[57] Post- and pre-*Griswold* discussions of the Ninth Amendment have surveyed its history in the convention and the courts. They point to the accuracy of Mr. Justice Goldberg's interpretation, as contrasted with that of the dissents. *See generally* Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814 (1966); Franklin, *The Ninth Amendment*, 40 Tul. L. Rev. 487 (1966); *Symposium—Comments on the Griswold Case*, 64 Mich. L. Rev. 197, 207, 227-28, 254-55, 268-71 (1965); Redlich, *Are There "Certain Rights . . . Retained by the People?"* 37 N.Y.U. L. Rev. 787 (1962).

[58] The Note cited above, 33 U. Chi. L. Rev. at 825, reaches the same conclusion after an exhaustive study of the Ninth Amendment:

> "In summary, whether one reads the history of the ninth as foreclosing the 'imperfect enumeration' theory, or as attempting to avoid future definitional problems, the amendment clearly remains a rule of construction with the purpose of obviating the possibility of interpreting the first eight amendments as exclusive. It is not, as its history indicates, either a source or a summary of those unenumerated rights."

ment. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated and an intent that the list of rights included there not be deemed exhaustive." 381 U.S. at 492.

No specific constitutional provision covers the rights to marry, raise children, travel, attend private school, to dress as one chooses, to pursue one's chosen profession, or a host of rights which might someday be invaded by legislatures. The framers could hardly be expected to undertake the herculean task of listing all personal rights which might be regarded as of equal stature to those more specifically spelled out. Therefore, it appears, they enacted the Nine Amendment.

Recognition of the rights being asserted on this appeal would not usher in a vast increase in judicial power. What has been said pertaining to *Griswold* applies here:

> "*Griswold* v. *Connecticut* is a reaffirmation of a power long exercised by the Court in protecting fundamental rights. It required no judicial roving at large to reach the conclusion that the freedom of the marital relationship is a part of the bundle of rights associated with home, family, and marriage—rights supported by precedent, history, and common understanding. For a court to find that these rights are fundamental, whether because they are deeply written in the tradition and conscience of our people, are part of the concept of ordered liberty, are implicit in the notion of a free society, or emanate from the totality of the constitutional order, involves no immodest or startling exercise of judicial power. The decision operates within a narrow sphere. In exercising its power in *Griswold*

to protect a fundamental personal liberty, the Court, far from advancing to a new milepost on the high road to judicial supremacy, was treading a worn and familiar path."

Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case,* 64 Mich. L. Rev. 235, 258 (1965). And, as Professor Sutherland suggested, "[i]f anyone rebels at the thought of entrusting this power to the nine Justices, he may well consider for a little while to whom he would prefer to entrust it; this can be a sobering experience." Sutherland, *Privacy in Connecticut,* 64 Mich. L. Rev. 283, 288 (1965).

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Accepting, then, that Appellee, physicians similarly situated, and their patients are rightfully asserting fundamental rights of constitutional dimension, it is necessary to evaluate the competing interests of the government.

Two governing principles must be satisfied to sustain this statute: Its provisions must be (1) narrowly drawn, and (2) supported by compelling governmental interests. As outlined in the majority and concurring opinions in *Griswold*:

"a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' *NAACP* v. *Alabama,* 377 U.S. 288, 307." 381 U.S. at 485.

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"In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing

that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' *Bates v. Little Rock*, 361 U.S. 516, 524." 381 U.S. at 497 (concurring opinion of Goldberg, *J.*).

D. Insufficiency of Governmental Interests

Whether the District's abortion statute, with its potentially drastic sweep, can be independently justified as promoting public health in 1970 is not even a close question. The statute clearly does not generate a more healthy female population. Rather, it creates "a public health problem of pandemic proportions" [59] by denying to women the opportunity to obtain safe medical treatment in controlling their personal reproduction.[60]

Although Appellants have not sought to support the statute as a compelling (or even rational) public health measure, this appears to be the principal justification ever brought forward for such laws.

All available evidence from the last century indicates that the dangers of abortional surgery, and no other consideration, provoked the statutes against abortion. In fact,

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[59] Hall, *Abortion in American Hospitals*, 57 Am. J. Pub. Health 1933, 1934 (1967).

[60] Some will contend that women themselves, not the statutes, create their own public health quandries by refusing the role of compulsory motherhood and seeking non-medical abortion as a last resort. But that is a bootstrap contention which the State may not make. The statute itself must be said to create the health problems, for its very terms foreclose access to safe medical abortion in many if not most cases of pregnancy. As shall be shown, *infra*, medical abortion is safer than childbirth, and permissive abortion practice, of necessity, would enhance the public health, not the contrary.

a statute was proposed in New York in 1828 which would have criminally punished "any surgical operation . . . unless it appear that the same was necessary for the preservation of life. . . ." [61]

In 1828 all surgery which involved insertion of instruments into body cavities was highly dangerous because of uncontrollable infection and pain-induced shock. Abortion, which would have involved the insertion of unclean instruments into the uterine cavity, was accordingly a frightfully dangerous procedure at that time. It was 1884 before Sir Joseph Lister's aseptic techniques[62] gained widespread acceptance in New York City circles,[63] and only much later, 1934, before curettage was routinely used in hospital treatment of incomplete abortion.[64] Effective antibiotics came into use after 1942 to inaugurate a new era in medicine and surgery.[65]

Nineteenth century judicial commentary showed an acute awareness of the fact that surgical dangers underlay the

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[61] 6 Revisers' Notes, pt. IV, ch. 1 tit. 6, §28 at 75 (1828). *See generally*, Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968).

[62] Lister's findings first appeared in an 1867 issue of *The Lancet*. Earlier discoveries along the same lines had been made by Semmelweis and Oliver Wendell Holmes, Sr. *See generally*, Holmes, *The Contagiousness of Puerperal Fever* (1843); I. SEMMELWEIS, THE AETIOLOGY, CONCEPT, AND PROPHYLAXIX OF CHILDBIRTH FEVER (1861); H. ROBB, ASEPTIC SURGICAL TECHNIQUE WITH ESPECIAL REFERENCE TO GYNAECOLOGICAL OPERATIONS (1835); C. HAAGENSEN & W. LLOYD, A HUNDRED YEARS OF MEDICINE (1943).

[63] C. HAAGENSEN & W. LLOYD, *supra* note 62, at 292-93.

[64] Douglas, *Toxic Effects of the Welch Bacillus in Postabortal Infections*, 56 N.Y. State J. Med. 3673 (1956).

[65] *Id.*

statutes.[66] A 1943 decision in the District reflected the same concern. *Williams* v. *United States*, 78 U.S. App. D.C. 147, 150, 138 F.2d 81, 84 (1943) ("The dangers of abortion . . . come from . . . incompetent, unscrupulous practitioners, operating in secrecy, without antiseptic conditions . . . .").

In sum, the statute *when enacted* in 1901 was probably a useful public health measure. Today, almost 70 years later, the statute and its purpose remain virtually unchanged. It purports to protect the women, however, even from abortions performed in safe clinical facilities.

While abortion statutes lay on the books for years on end, the realm of surgery has undergone changes of profound magnitude.

Of special relevance to this appeal is the fact that clinical abortions today, in early pregnancy, are much safer than childbirth. Thus, the government's health interest in preventing abortion is not compelling; it is neither reasonable nor rational; it is wholly non-existent. The public health interest would be served greatly by permitting pregnant women to have abortions when they so desire, not by forcing them into more dangerous courses—pregnancy, or extra-clinical abortion.

Tietze published a study in September of 1969 which summarized the relevant data, as follows:

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[66] See *State* v. *Murphy*, 27 N.J.L. 112, 114-15 (Sup. Ct. 1858):
"The design of the statute was not to prevent the procuring of abortion, so much as to guard the health and life of the mother against the consequences of such attempts."

State v. *Gedicke*, 43 N.J.L. 86, 96 (Sup. Ct. 1881):
"[Abortion] in almost every case endangers the life and health of the woman."

"*Mortality* associated with *legal abortion* performed in hospital, at an early stage of gestation: *3 deaths per 100,000 abortions* . . . ." [67]

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"*Maternal Mortality* from complications of, or associated with, pregnancy, child-birth, and the puerperium, *excluding induced abortion: 20 deaths per 100,000 pregnancies.*" [68]

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"*Mortality* associated with *highly effective contraception: 3 deaths per 100,000 users per year* . . . ." [69]

Thus, abortion is almost seven times as safe as childbirth.

Yet, abortions are not freely available to most women who request them. The statute is generally interpreted by hospitals to prohibit abortion except in a narrow range of cases, a range which varies from physician to physician and hospital to hospital. The effect of these wide-ranging interpretations is to deny abortions to the poor, thus adding a gross factor of statutory discrimination to those hardships which the government is otherwise trying to correct.

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[67] Tietze, *Mortality With Contraception and Induced Abortion*, 45 Studies in Family Planning 6 (1969) (emphasis in original). For further substantiation of the safety of early abortion on healthy women under appropriate medical conditions, see Tietze, *Abortion Laws and Abortion Practices in Europe* (1969); Tietze, *Abortion in Europe*, 57 Am. J. Pub. Health 1923 (1967); Tietze & Lewit, *Abortion*, 220 Scientific American 3 (Jan. 1969); Kolblova, *Legal Abortion in Czechoslovakia*, 196 J.A.M.A. 371 (1966); Mehland, *Combatting Illegal Abortion in the Socialist Countries of Europe*, 13 World Med. J. 84 (1966).

[68] *Id.*, based on the United States "rate of maternal mortality, excluding abortion, [which] was 18 per 100,000 live births in 1964-66." *Id.*

[69] *Id.*, citing Inman & Vessey, *Investigation of Deaths from Pulmonary and Cerebral Thrombosis and Embolism in Women of Child-bearing Age*, 2 Brit. Med. J. 193 (1968).

The statute as implemented, moreover, forces women to go elsewhere, often to non-medical practitioners who do not operate under conditions of safety. At worst they utilize coat-hangers and knitting needles.

The medical literature is replete with discussions of the public health dangers created by non-medical abortions.[70] The incidence of death from bungled abortion is no longer of startling magnitude.[71] However, severe infection and irreversible sterility occur with unfortunate frequency.[72]

One can fairly contend that this would all not be the case but for the inevitable effects of a vague and potentially sweeping statute.

Viewed in light of the constitutional mandate that a statute touching fundamental liberties must be narrowly drawn and supported by a compelling state interest, this

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[70] *See, e.g.*, Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion*, 199 J.A.M.A. 805 (1967); Shenoi, *Massive Removal of Small Bowel During Criminal Abortion*, 2 Brit. Med. J. 929 (1966); Decker & Hall, *Treatment of Abortion Infected With Clostridium Welchii*, 95 Am. J. Obst. & Gynec. 394 (1966); Moritz & Thompson, *Septic Abortion*, 95 Am. J. Obst. & Gynec. 46 (1966); Knapp, Platt & Douglas, *Septic Abortion*, 15 Obst. & Gynec. 344 (1960) (concerning experience at the New York Hospital); Studdiford & Douglas, *Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse*, 71 Am. J. Obst. & Gynec. 842 (1956) (Bellevue Hospital); Douglas, *Toxic Effects of the Welch Bacillus in Post-abortal Infections*, 56 N.Y. State J. Med. 3673 (1956).

[71] Earlier estimates were of 10,000 deaths per year. J. Bates & E. Zawadzki, Criminal Abortion, 3-4 (1964). With the advent of anti-biotics, however, 500-1,000 is a more reliable national estimate today. Hall, *Commentary* in Abortion and the Law 228 (D. Smith ed. 1967).

[72] *See, e.g.*, S. Kleegman & S. Kaufman, Infertility in Women 301 (1966): "Induced illegal abortion . . . is one of the most important causes of subsequent infertility and pelvic disease."

statute cannot be sustained as a public health measure. It is not narrowly drawn to prohibit abortion by non-medical personnel outside of the clinical setting. Nor is there a compelling interest, or any health interest whatsoever, for prohibiting abortion in a medical facility. The operation, it should be recalled, excels its alternative, childbirth, many times over in terms of safety.

Congress also has neither a compelling nor rational basis for adopting a policy in favor of increased population.[73]

Although Appellants have not strongly contended that the doctrine of "be fruitful and multiply" supports their position, abortion statutes have frequently throughout history been enacted for this very purpose. It is important to establish not only that increased population is not a compelling governmental interest, but also that increasing population, calmly viewed, is a major social problem in the nation, and the world.

The national population today is over 200 million,[74] and that of the world is 3.2 billion.[75]

> "Looking ahead, it is estimated that the world population will double yet again by the end of this century, reaching a total of 6.4 billion in the short period of 30 years. Beyond that, the next doubling could take a mere 15 years."[76]

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[73] *Cf.* Clark, p. 9: "Procreation is certainly no longer a legitimate or compelling state interest in these days of burgeoning populations."

[74] U.S. BUREAU OF THE CENSUS, *Statistical Abstract of the United States: 1969*, Table 11, at 12 (90th ed.).

[75] Rossi, *A Behavioral Scientist Looks at Abortion* in ABORTION IN A CHANGING WORLD (R. Hall ed. 1970) (in press).

[76] *Id.*

This geometrical growth rate of population poses

> "tremendous problems of providing jobs, finding schools, and constructing livable urban environments for a population which is already in a mass movement to urban areas." [77]

"With this prospect ahead for the next few generations, it is scarcely surprising that so many writers view human fertility control as *the* problem of man in the late 20th century." [78]

This abortion statute intensifies the problem of population by largely excluding voluntary abortion as a means of regulating family size when contraception failed or was not used. Only when women have had this option has population growth *sua sponte* leveled-off to a small or negligible rate.[79]

In sum, the statute in question finds neither compelling nor rational justification in a governmental policy favoring increased population. Thus Congress has failed to put forward a compelling justification for the statute and it must be found to violate the United States Constitution.

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[77] Kaplan & Chez, *The Economics of Population Growth*, 103 Am. J. Obst. & Gynec. 133, 135 (1969).

[78] Rossi, *supra* note 75. The literature on the burgeoning population and its consequences is massive. *See, e.g.*, P. Ehrlich, The Population Bomb (1968); W. Thompson & D. Lewis, Population Problems (1965); P. Hauser (ed.), The Population Dilemma (1963); Foerster, Mora & Amiot, *Doomsday: Friday, 23 November, A.D. 2026*, 132 Science 1291 (1960).

[79] *See*, Tietze, *Abortion Laws and Abortion Practices in Europe* (1969).

CONCLUSION

For the reasons set out, the Motion to Affirm should be granted.

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